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IN THE

Supreme Court of the United States

OCTOBER TERM. No.

Theatre Enterprises, Inc., Petitioner,

v.

Paramount Film Distributing Corp.,
Loew's Incorporated,
RKO Radio Pictures, Inc.,
Twentieth Century-Fox Film Corporation,
Universal Film Exchanges, Inc.,
United Artists Corporation,
Warner Bros. Pictures Distributing Corp.,
Warner Bros. Circuit Management Corp.,
Columbia Pictures Corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Theatre Enterprises, Inc., prays that a writ of certiorari issue to review final judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on January 5, 1953.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F. 2d.

STATEMENT OF THE MATTER INVOLVED.

This is an action begun on March 20, 1950, by Theatre Enterprises, Inc., a Maryland corporation, under the anti-trust laws against the eight largest and most important motion picture companies in the United States. Petitioner sought injunctive relief and monetary damages for the loss suffered as a result of defendants' denying petitioner's theatre access to first-run product in Baltimore.*

Suit was originally instituted in the United States District Court for the Eastern District of Pennsylvania, but the case was transferred to the United States District Court for the District of Maryland where it was tried before Judge William C. Coleman and a jury. The jury brought in a verdict in favor of all defendants, which was affirmed on appeal.

This case revolves around the denial of first run motion pictures to petitioner's new 1600-seat Crest Theatre, built, at the cost of almost half a million dollars, six miles away from the nearest downtown first run theatre in Baltimore. The trial judge submitted all the issues to the jury having refused to charge as a matter of law that the conduct of the defendants, *based on the admitted and undisputed evidence*, established a fixed and arbitrary system of runs and clearances causing the exclusion from the first run exhibition field of any independent exhibitor whose

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*The complaint contained a second cause of action seeking damages for the loss suffered as the result of discriminatory practices to which petitioner's theatre was subjected even on the first subsequent run which it was granted. Although much evidence was submitted on this phase of the case during the trial, questions relating to it were not raised on appeal.

theatre is located outside of the downtown area of cities. This conduct, it was argued, violated the anti-trust laws and the decrees following this Court's opinion in *United States* v. *Paramount Pictures, et al.*, 334 U. S. 131 (1948).

The defendants admit that if the Crest Theatre were in downtown Baltimore or were owned by one of themselves, it would be granted access to first run films. They gave as their principal reason for their refusal so to license pictures to the Crest the fact that they have a uniform policy, not only in Baltimore but in all the cities throughout the United States, limiting the exhibition of first run pictures to downtown theatres. Significantly, two of the defendants, Loew's and Warner, rejected the petitioner's request for first run because if it were granted they feared the competition to their own downtown theatres in Baltimore and other cities.

The existence of this national policy was specifically admitted by the defendants as was the knowledge of each that the others followed the same policy. Defendants' counsel, in his opening statement to the jury speaking about petitioner's request for access to first run pictures, said (1a):

> "That is his idea of the new manner of distribution that he wants to put into Baltimore and thus change the entire manner and method that has been in existence in this state, and most of the states of the United States, for years and years."

Some of the defendants attempt to assign other "business reasons" as additional justification for refusing petitioner first run, but these do not militate against the illegality of the maintenance of this admittedly uniform policy.

The evidence in this case must be viewed against the background of the conduct of the motion picture industry by these defendants. As was held in the *Paramount* case:

1. These defendants conspired to evolve and maintain a uniform system of run and clearance.

2. These defendants have imposed arbitrary and unreasonable clearances.

3. The system of run and clearance evolved by or acquiesced in by these defendants frequently worked to the disadvantage of independent exhibitors in competition with affiliated exhibitors and to the disadvantage of new theatres trying to break into the field and compete with old customers of these defendants.

4. One of the purposes of the theatre-owning defendants, in fixing runs and clearances, was to exclude competition to their own theatres.

Against that background must be placed the following which appears from the undisputed evidence in the present case:

1. The defendants uniformly deny petitioner access to first-run pictures, but uniformly grant first subsequent run pictures.

2. The defendants uniformly adhere to a policy, applicable not only to Baltimore but throughout the United States, which limits the showing of first-run pictures to downtown theatres.

3. Each defendant knows that every other defendant has followed the same national policy for many years, before, during and after the *Paramount* litigation, and has applied the policy to all theatres located outside of the downtown sections of cities no matter how fine they may be and no matter what film rental they may offer.

4. The rare exceptions to the national policy recognized by the defendants have been made almost always for theatres owned by one of themselves or else to avoid the obvious discrimination which would

be manifest by denying the run to an independent in a city where one of the defendants' own suburban theatres is granted to run.

5. Five of the defendants own hundreds of theatres throughout the country, many of which are first-run theatres and practically all of which first-run theatres are located in the downtown sections of cities.

6. All defendants license their first-run pictures to theatres owned by these five and substantial revenues are derived from such cross-licensing.

7. All defendants know of the theatre ownership of the five, know of the cross-licensing and of the substantial revenues thus derived.

8. Petitioner's Crest Theatre is a new $460,000 sixteen hundred seat house located six miles from the nearest downtown theatre, is comparable to the theatres in Baltimore actually granted first-run and, if it had been located downtown, or if it had been owned by one of the defendants, would itself have been granted first-run.

9. Petitioner was willing to pay by certified check film rentals equal to or greater than those actually received by the defendants from their existing first-run accounts.

10. The defendants refused to grant the Crest first run because they feared the competition to their own downtown first-run houses from the Crest and from similar demands of suburban theatres all over the country.

11. The decisions of the defendants were made without regard to the particular circumstances of the Crest Theatre and without any top executive actually seeing the theatre.

12. The decisions of the defendants and their national policy necessarily establish a fixed and

arbitrary system of runs and clearances and cause the exclusion of any independent exhibitor from the first-run exhibition field if his theatre is located outside of the downtown area of cities.

These twelve points of the present case are accepted by the Court of Appeals in its opinion with the single exception of the reference to the fact that the defendants had a fixed and arbitrary system of runs and clearances. Nevertheless, the judgment for the defendants was affirmed.

* * * * * * *

The factual situation, as revealed in a little more detail by the record below, is as follows:

The theatre situation in Baltimore.

For many years, eight theatres located in the downtown section of Baltimore have had divided among them the first-run product of the defendant companies (2a-6a). Loew's has operated two of these houses and Warner Bros. one. The other five theatres have been owned by independent exhibitors. Over the years there has been no change in the division of product among the various theatres. For example, Warner's Stanley Theatre has always exhibited all of Warner and half of Paramount pictures, while Loew's houses have always exhibited all of Loew's, half of Universal and some United Artists pictures. This rigid allocation was explained by defense witnesses on the ground that each company had a satisfactory customer and saw no need to seek better terms from any other exhibitor (144a).

The construction of the Crest Theatre and its qualifications.

The Crest Theatre was built as part of a shopping center after a population survey revealed that about

105,000 people lived in the immediate vicinity. The qualifications of the Crest are not really disputed. It received an international award as one of the finest theatres built in the western hemisphere in 1949 (53a), and the correspondence and testimony of the defendants show their recognition of its merits (22a, 64a, 84a, 144a, 191a). Witnesses for Columbia, Universal, Paramount and Loew's all agreed that if the Crest were located downtown it would have access to first-run pictures (206a, 211a, 219a). Warner's District Manager even intimated that the Crest, located where it is, would have been able to license first-run day and date pictures had Warner owned it (166a).

Petitioner's efforts to obtain first-run pictures.

Even before ground was broken for the Crest, petitioner's president, Mr. Myerberg, in January, 1948, went to the branch offices of the defendants in Washington, informed them of his plans and sought first-run pictures. He was uniformly advised that no consideration could be given to his request until the theatre was near completion (10a, 189a). Thereafter, from October, 1948, on, repeated efforts were made and voluminous correspondence exchanged, to no avail. Petitioner was "stalled" by at least one company (48a), two did not reply at all (28a), and Mr. Myerberg was never able to see any company representatives, apart from the Washington branch managers and salesmen, except the Eastern Division managers of Fox and Universal and the assistant to the Vice President of RKO (29a, 43a, 50a). All his efforts met a uniform refusal.

Petitioner's specific offers for particular pictures for first-run exhibition, which included very substantial guarantees of film rental, and a readiness to post certified checks, were either rejected or ignored (29a, 45a, 55a, 58a, 59a).

What the petitioner sought.

Because the Crest was located 6 miles away from the nearest downtown first-run theatre, petitioner has always been convinced that it was too far away to be considered in substantial competition with those theatres. Consequently, petitioner has always been ready and willing to exhibit the defendants' pictures on first run day and date with any of the downtown houses, and has been willing to pay the same film rentals for a day and date or an exclusive first run. Since the defendants took the view that the Crest was in substantial competition with the downtown first-run theatres, petitioner has always been ready and willing to negotiate or bid competitively against those theatres for the right to exhibit pictures on an exclusive first run.

In essence, then, what petitioner sought was the opportunity to exhibit pictures on *first run*, and although it would have preferred to exhibit them simultaneously with a downtown house, it was prepared to accede to the defendants' contention of substantial competition if thereby the Crest were at least given the opportunity to compete.

The uniform rejection by defendants and their reasons.

Not a single home office executive with ultimate responsibility for making the decision saw the Crest Theatre before it was uniformly denied first-run and uniformly granted first subsequent-run pictures (50a). All companies acted on the basis of the national policy limiting the showing of first-run films throughout the country to downtown theatres. Although other purported "business" reasons were referred to, they were actually attempted explanations or justifications for the national policy. The most significant such reason is the assertion by the defendants that they had "satisfactory customers" in the downtown theatres, and saw no reason to depart from their old

policy of preferring those customers (144a, 148a). The defendants claimed that playing first-run pictures in a so-called suburban theatre like the Crest could not be successful although, with only rare exceptions mentioned below, they had never experimented with the idea nor would they experiment with it (150a, 230a).

The national policy of the defendants.

The national policy referred to in defense counsel's opening statement, noted above, was spelled out by witnesses from each company. Space limitations permit the quotation of a single example only, but representative of all such testimony is that of Mr. Zimmerman of RKO (145a-146a):

"Q. Now, let us take this specific example. Suppose the Crest Theatre was located in the downtown area of Baltimore. Would it have right to access?

A. Yes.

Q. It would have right to have access to RKO pictures on first run in the City of Baltimore?

A. It would be offered a competitive opportunity.

Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

A. I think that is a fair statement of the reasons for our decision.

Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

Q. Is not that true also with regard to other cities in the country?

A. Yes, generally true with respect to other cities, depending on circumstances."

Executives from Warner's (164a), Fox (182a), Loew's (233a), Paramount (218a), Columbia (60a) and Universal (213a) testified to the same effect.*

The exceptions to the national policy.

In about half a dozen situations throughout the country the defendants have granted access to first-run pictures to theatres located outside of the downtown areas. In so doing they have demonstrated their power and control over the distribution and exhibition of motion pictures as well as the complete unsubstantiality of their "business reasons" for refusing the Crest.

An example is found in Washington, D. C. There Warner Bros. owns and operates a first-run theatre, the Warner, in the downtown section and another theatre, the Ambassador, located approximately 2½ miles from downtown. Despite all the purported reasons against such a practice, Warner's Ambassador has for years played Warner, Paramount and Columbia first-run pictures day and date with the Warner downtown house (69a).

In 1951, an independent exhibitor sought first-run pictures for the new Ontario Theatre at 17th and Columbia Road, a block away from Warner's Ambassador. Paramount's Washington Branch Manager wrote to his superiors that the demand, if pushed, "can result in a real whopper" and "could lead to one fine mess" (70a). He warned that "this is a rather ticklish situation as you can readily understand" (72a). Higher officers "stressed the importance of the matter" and felt "that a conference should be held relative to it" (74a). The Ontario Theatre actually obtained Paramount pictures on an exclusive first run (75a). Paramount's Assistant General Sales Manager admitted that this was granted because Warner's Ambassador Theatre had for years been granted access to Paramount product (216a, 218a).

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* United Artists called only a former Branch Manager who knew nothing of the situation.

In a few other instances the defendants also ignored all the so-called business reasons which they said prevented their granting first-run to the Crest and gave such a preferred run *to their own theatres* even though located away from downtown. Thus, it was done in Kansas City (90a) and Denver (205a) where Fox owned "neighborhood houses" and in Boston where Loew's owned such a theatre and in Los Angeles where a number of the defendants owned theatres (204a).

In Wichita, Kansas, Fox's Boulevard Theatre, more than four miles away from downtown, played first run and when two new independent theatres in the same area sought equal access they were ultimately granted it because, as one of Paramount's lawyers wrote (105a):

> "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discrimination in favor of Fox if we do not offer a comparable theatre the same opportunity."

It should be added that despite the assertion that the change in the national policy would be bad business, would harm the first and subsequent run revenues derived by the defendants and would cause the elimination of the downtown theatres, the defendants' witnesses themselves admitted that these exceptions to the policy have been successful (161a), and, contrary to their predictions, the subsequent run theatres had not gone out of existence nor have the first-run theatres really been hurt (185a).

The defendants' theatre holdings and cross-licensing.

The record below supports the well-known facts of the importance of the defendants' pictures (142a), the ownership by the Big Five of hundreds of theatres throughout the country (126a, 138a) and the cross-licensing

and payment of substantial sums for film rental among the defendants (178a, 203a, 230a). It is also shown that many of the theatres owned by the Big Five are first-run houses which, with almost no exception, are located downtown (139a, 176a).

These facts supply the real economic motivation for limiting the showing of first-run pictures to downtown theatres in accordance with the defendants' national policy.

Charles V. Grimes, of Warner Bros., admitted that his company opposed the granting of first run to the Crest and other theatres like it because "it would destroy" Warner Bros., Stanley and all other downtown houses (162a). Mr. Grimes explained that Warner's simply did not want the Crest competing with the Stanley (162a).

Robert Smeltzer of Warner Bros. (103a) and John F. Murphy of Loew's (223a) testified to the same effect. William F. Rodgers of Loew's drove the point home by admitting that if theatres out of the downtown area were to get access to first-run pictures, he feared that the revenues derived by Loew's from the exhibition of its pictures in the downtown first-run house operated by the other defendants would be considerably curtailed (230a).

The defendants' knowledge.

The defendants' key witnesses admitted that each knew that the other defendants adhered to the same policy. As Mr. Zimmerman of RKO pointed out, all one had to do in order to be aware of the fact was to look in the papers (150a). In addition, however, Paramount's Washington Branch Manager wrote his home office before the Crest opened, told his superiors exactly what the other companies were going to do, and recommended doing the same thing (66a). The Fox Branch Manager testified flatly, "* * * we did what everyone was doing" (192a).

The amazing interchange of top sales and distribution personnel among the various companies is the most striking evidence of all establishing the knowledge pos-

sessed by each defendant of the conduct of the owners in denying first-run to suburban theatres.

Thus, Alexander Lichtman has been successively General Manager for Paramount, Vice President and General Sales Manager and later President of United Artists, then Vice President of Loew's and, at the time of the trial, Vice President of Fox (167a). The president of Fox is Spyros Skouras, a life-long friend of Mr. Lichtman (168a). Mr. Skouras has a brother, George, who heads a separate circuit, operating "quite a number" of theatres (175a-176a). There is another brother, Charles Skouras, who heads the subsidiary of Fox itself which operates "approximately 500 theatres", many of which are first-run downtown houses (176a).

One of the executive heads of Fox is Joseph Schenck, the brother of Nicholas Schenck, who is the president of Loew's, Inc. (175a).

Andrew Smith, who preceded Mr. Lichtman in his sales position with Fox, had himself earlier held similar positions with RKO and Warner (140a).

Mr. Smith's successor as General Sales Manager at RKO was Robert Mochrie, and Mr. Mochrie before going with RKO was a sales executive with United Artists and Warners (140a).

Samuel Goldwyn, whose pictures are now distributed through RKO, used to be one of the chief executives of United Artists (141a).

Another sales executive of United Artists, during Mr. Lichtman's tenure there, was G. L. Sears, who was formerly with Warners in a similar capacity (177a).

Howard Minsky, one of the Fox officials who participated in the discussions about the Crest, is now with Paramount (176a). Fred Meyers, once Universal Eastern Division Sales Manager, is now with United Artists and used to be with RKO.

Loew's General Sales Manager is now Charles Reagan, who previously headed Paramount's sales force

(177a). Edward K. O'Shea, for the last six years the Assistant General Sales Manager of Paramount, was for 26 years with Loew's (177a).

William Scully, the General Sales Manager of Universal, once was a sales executive with Loew's (177a) and Mr. Blumberg, the President of Universal used to be Vice President of RKO (178a).

The effect of denying the Crest first run.

The defendants recognized that their denial of first run to the Crest had the effect "naturally" of confining first run to the downtown area (150a) and of fixing the terms, conditions and manner in which this new $460,000 theatre could compete in the motion picture industry (189a). The decision of the defendants fixed the run and the clearance for the Crest (206a) as well as for all theatres throughout the country located outside the downtown sections of cities.

Petitioner contended, therefore, that in effect a fence had been erected by the defendants around one portion of the motion picture industry and that thereby competition was unreasonably restricted.

The Paramount case.

In accordance with Section 5 of the Clayton Act, petitioner offered in evidence the pertinent portions of the decrees from the *Paramount* case. Although Judge Coleman originally sustained the defendants' objections to this offer, before the case went to the jury he admitted the decrees. He charged the jury most briefly concerning the Government's action and rejected all of the requests for instruction submitted by petitioner for the purpose of explaining the effect of the *Paramount* case to the jury, in accordance with the procedure set forth in *Emich v. General Motors Corporation*, 340 U. S. 558 (1951). The trial judge's charge and his denial of these

and other requested instructions form the basis of numerous exceptions taken by the petitioner.

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The reason supporting petitioner's contention that the defendants' conduct, measured against the yardstick of the *Paramount* case, violated the antitrust laws *as a matter of law* was summed up succinctly in *Milgram* v. *Loew's, Inc.*, 94 F. Supp. 416, 421 (1950), affirmed in 192 F. 2d 579 (C. A. 3, 1951), cert. denied 96 L. ed 508 (1952):

> "Both the District Court and Supreme Court, in the Paramount case, unqualifiedly condemned any system of clearance which had 'acquired a fixed and uniform character' and which were 'made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.'"

The *Milgram* case is extraordinarily apposite to the present case since there the same defendants violated the antitrust laws by their uniform conduct to effectuate their nationwide policy denying first-run pictures to *drive-in* theatres. In *Milgram* these defendants advanced the identical "business reasons" which they used against petitioner's conventional theatre in Baltimore, but these were held by the Court of Appeals for the Third Circuit to be "not strictly relevant" (192 F. 2d at 585) and were rejected in the face of the existence of the national policy.

The Court of Appeals in affirming the judgment in the present case held "that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision". It attempted to distinguish *Milgram* on the ground that it was tried without a jury and that the trial judge inferred a conspiracy from the circumstances of uniform action before him. In the same way the Court sought to dis-

tinguish two other decisions from the Third Circuit, *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738 (1945), cert. denied 334 U. S. 811 (1948), and *Ball* v. *Paramount Pictures*, 169 F. 2d 317 (1948), cert. denied 339 U. S. 911 (1950).

Actually in both *Goldman* and *Ball* the trial judge sitting without a jury had found in favor of the defendants because in each instance he was unable to conclude that the purported business reasons of the defendants were not reasonably valid and because he had not been able to find a conspiracy. The importance of these cases arises from the fact that the Third Circuit reversed both judgments and held *as a matter of law* that the particular conduct of the defendants constituted a conspiracy. On the basis of this authority, petitioner in the present case contends that the Court of Appeals for the Fourth Circuit erred in affirming the trial judge's submission of the issue of conspiracy to the jury. Under the rulings in *Paramount*, *Goldman* and *Ball* the conduct of the defendants is necessarily to be equated with conspiracy and it was error to permit the jury below to speculate about the problem.

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The decrees from the *Paramount* case having been admitted below, petitioner requested various instructions to explain the full scope and effect of the earlier case. In trying to meet the obligation placed upon him by the *Emich* case, the trial judge charged the jury in five sentences only (273a):

> "* * * I instruct you that in that case, which was a suit between the Government and these same defendants which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run

and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibition from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable."

Petitioner contends that this portion of the charge is both inadequate and erroneous. Actually the trial judge for all practical purposes took the *Paramount* case out of the jury's consideration by asserting that it did not cover the Baltimore factual situation and *therefore*, it was still necessary for petitioner below to prove the conspiracy charged.

Baltimore was in fact referred to in the Government's Amended Complaint but, in any event, there was no requirement that the Government prove all the issues that might arise in any given locality: *Deluxe Theatre Corp.* v. *Balaban & Katz Corp.*, 95 F. Supp. 983, 986 (N. D. Ill., 1951).

The trial court's attitude and intention with regard to the *Paramount* case are illuminated by his remarking (211a), "That was a pretty big order, wasn't it?", when his attention was invited to the rule of the *Emick* case. Later, in colloquy with counsel, he said (1501), "All you

are entitled to is what I understand to be the bald principles that are announced in these decrees," But the comment which most clearly reveals the arbitrary and rigid limitations being placed upon petitioner's use of the *Paramount* case is found in Judge Coleman's remark to counsel (236a):

> "* * * it does not amount to anything, it has not force, no probative value unless they [the jury] find a concert of action."

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions". It added that the trial judge had properly told the jury, in line with *Fifth & Walnut Inc.* v. *Loew's Inc.*, 176 F. 2d 587 (C. A. 2, 1949), that the decree from the *Paramount* case was not conclusive but only *prima facie* evidence of conspiracy. Petitioner here had not, however, contended that the *Paramount* decrees were conclusive but had only sought a full and clear charge on the subject which was required by the *Enich* case and which was necessary in order to have the facts in the present case fall into proper perspective. Compare *Ball*, 169 F. 2d at 321, and *Milgram*, 192 F. 2d at 581.

Judge Coleman's misapprehension of the scope and effect of the *Paramount* case manifested itself in other ways in his charge. Thus, the jury was instructed over objection that Loew's and Warner had an unqualified legal right to place their own pictures in their own theatres (271a). These defendants are, however, enjoined by the *Paramount* decrees from granting any clearance to theatres not in substantial competition and therefore Judge Coleman was requested to instruct the jury that if it found that the Crest was so far away from the Warner and Loew houses as not to be in substantial competition, then clearance between those theatres would be improper; in other words, if there were no substantial competition, the Crest would be entitled to play day and date with these defendants' own theatres.

The refusal of this request left the jury in ignorance of the entire problem of day and date first-run exhibition, a crucial issue in this case.

Furthermore, the petitioner was seeking injunctive relief for the future. No matter what might have been true in the past, it was admitted at the time of trial that Loew's, for example, was then no longer licensing its product exclusively to its own Century Theatre. Other houses were being given access and the Crest, therefore, was entitled to equal treatment. The situation had changed because of the divorcement and divestiture treatment of the *Paramount* decrees, but the trial judge below did nothing to inform the jury with regard to those matters.

On the contrary, in telling the jury that Loew's and Warner's had the absolute legal right to do with their pictures what they chose, the court likened the situation to a person selling his own home grown farm products in his own grocery store (267a). This economic analogy is, of course, contrary to the recognized fact that these defendants produce the desirable motion pictures on which the operators of first-run theatres in this country are dependent in order to stay in business: *White Bear Theatres Corp.* v. *State Theatre Corp.*, 129 F. 2d 900, 903 (C. A. 8, 1942); *William Goldman Theatres, Inc.* v. *Loew's, et al.*, 150 F. 2d 738, 741 (C. A. 3, 1945); *Gittone* v. *Warner Bros. Pictures, Inc.*, 30 F. Supp. 823 (E. D. Pa. 1939), reversed on other grounds 110 F. 2d 292 (C. A. 3, 1949); *United States* v. *Paramount Pictures*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946).

This Court will recall that the decrees in the *Paramount* case provided that:

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

This provision had an important bearing upon burden of proof in the present case but we respectfully suggest that the trial judge's exposition of the problem must have left the jury completely confused. He said (273a):

"If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants.

"I will just summarize that again. I told you earlier that the burden of proof in this case, just like in all civil suits, generally speaking, rests upon the moving party; and if A sues B, the law says that A must prove his claim in order to recover. That is true in this case, as I have explained. But, by reason of the fact that what we may call the broad issues involved in this case were involved in the Paramount case, there is a statutory provision which allows those issues, insofar as they may have a bearing upon the issues in a particular case like this, to become *prima facie* evidence; and, if you find, as a result of your examination of those decrees, that, as respects clearances, these defendants, or any of them, have given unreasonable clearances, it is not necessary for you to find that the plaintiff has proved that, but the burden of showing that they are not unreasonable shifts over to the defendants.

"I might explain that a little more in A-B-C language in this way: a court order, which is called a decree for the purposes of this kind of a case, is obtained against certain parties,—let us say in a trademark case—that they can only use a certain

label or words in a certain way, and the party that was originally aggrieved thinks that label has not been followed out, but that a label in violation of the court's order has been used; so the parties can be brought into court; and then the burden is on that party who has used the new label to show that he is within the order of the court and is not in contempt of it. That, I think, explains somewhat the only really technical point of law that exists in this case."

This instruction begins by telling the jury that if petitioner proves a conspiracy, i. e., wins its case, then the defendant must assume the burden of proving the reasonableness of the clearance imposed. This can hardly be said to be in line with the provision of the decrees placing the burden of proof on the defendants in the beginning whenever a clearance provision is attacked. The court's instruction links reasonableness of clearance with conspiracy and literally shifts the burden of proof at a time when petitioner would be entitled to a directed verdict as a matter of law. This error, we submit, is compounded by the court's later language telling the jury that if they found from the *Paramount* decrees that the defendants had imposed unreasonable clearances then it was not necessary for the jury to conclude that petitioner had proved that fact. In that event, said the court, the defendants would have the burden of showing that the clearance was not unreasonable.

The fact is, of course, that if the jury found from the decrees that the clearance was unreasonable petitioner would have proved it since the decrees were introduced as part of its case. But, in addition, we respectfully suggest that this portion of the charge is a logical impossibility since if petitioner *proved* the clearance was *unreasonable* it would seem to follow that it would be impossible for the defendants to *prove* that the clearance was *not* unreasonable.

The Court of Appeals, however, found no error in any of these instructions.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment in question under Section 1254(1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

Petitioner seeks review of the judgment of the Court of Appeals for the Fourth Circuit of January 5, 1953.

STATUTES INVOLVED.

The statutes involved are the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. § 1,2) and the Clayton Act (Act of October 15, 1914, 38 Stat. 741. 15 U. S. C. § 15).

QUESTIONS PRESENTED.

1. Do not the following admitted or undisputed facts in the present case constitute as a matter of law a violation of the anti-trust laws:

a. The defendants uniformly deny petitioner access to first-run pictures, but uniformly grant first subsequent run pictures;

b. The defendants uniformly adhere to a policy applicable not only to Baltimore but throughout the United States, limiting the exhibition of first-run pictures to downtown theatres;

c. Each defendant knows that every other defendant has followed the same national policy for many years, before, during and after the *Paramount* litigation, and has applied the policy to all theatres located outside of the downtown sections of cities no matter how fine they may be and no matter what film rental they may offer;

d. The rare exceptions to this national policy recognized by the defendants have been made almost always for theatres owned by one of themselves or else to avoid the obvious discrimination which would be manifest by denying the run to an independent in a city where one of the defendants' own suburban theatres is granted the run;

e. Five of the defendants own hundreds of theatres throughout the country, many of which are first-run theatres and practically all of which first-run theatres are located in the downtown sections of cities;

f. All defendants license their first-run pictures to theatres owned by these five of their number and substantial revenues are derived from such cross-licensing;

g. All defendants know of the theatre ownership of the five, of the cross-licensing and of the substantial revenues thus derived;

h. Petitioner's Crest Theatre is a new $460,000 sixteen hundred seat house located six miles from the nearest downtown theatre, is comparable to the theatres in Baltimore actually granted first run and would itself have been granted first run if it had been located downtown or had been owned by one of the defendants;

i. Petitioner was willing to pay by certified check film rental equal to or greater than that actually received by defendants from their existing first-run accounts;

j. The defendants refused to grant petitioner's theatre first run because they feared the competition to their own downtown first-run houses from the Crest and from similar demands of suburban theatres all over the country;

k. The decisions of the defendants were made without regard to the particular circumstances of the Crest Theatre and without any top executive actually seeing the theatre;

l. The decisions of the defendants and their national policy necessarily establish a fixed and arbitrary system

of runs and clearances and cause the exclusion of any independent exhibitor from the first-run exhibition field if his theatre is located outside of the downtown area of cities?

2. Did the court below err in failing fully to explain the background, scope and significance of the *Paramount* case and its impact on the case at bar and in negativing the benefits of Section 5 of the Clayton Act by instructing the jury that petitioner still had to prove conspiracy since the present factual situation had not been before the court in the *Paramount* case?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The result reached in the present case and the rulings which led up to it are in conflict with the decision of this Court in the *Paramount* case as supplemented by the opinions of the Statutory Court. That case documented the conduct of these same defendants in conspiring to dominate and control the distribution and exhibition of first-run pictures throughout the country, and it held certain conduct—particularly the establishment of and adherence to a fixed and arbitrary system of runs and clearances made applicable generally without regard to the particular facts and circumstances of any given situation—to be violative of the antitrust laws. The decrees that were entered in that case outlawed that form of business practice, laid down certain rules with regard to burden of proof in antitrust cases when the legality of clearance was attacked, established certain obligations which had to be met by the distributors in the licensing of their films, and sought to recreate and protect equality of opportunity and freedom of competition in the industry.

The present case, if it is permitted to stand, illus-

trates the way in which these same conspirators are able to circumvent the injunctive provisions in the *Paramount* case and to perpetuate, with the sanction of the Court of Appeals for the Fourth Circuit, the same outlawed business practices which gave the defendants the "cream of the business", the lucrative first-runs.

2. In line with the *Paramount* case are the decisions of the Court of Appeals for the Third Circuit in the *Goldman* and *Ball* cases. These three cases in a similar manner equated as a matter of law certain conduct with conspiracy. Under these holdings there is no reason for speculation about the conclusion to be drawn from admitted or undisputed conduct such as we find in the present case. Consequently, the decision of the trial judge, as affirmed by the Court of Appeals below, in submitting to the jury the issue of conspiracy, is in direct conflict with the decisions of the Third Circuit and of this Court. Such a conflict should, of course, be resolved.

3. There is a similar conflict arising from the failure of the court below to adhere to the principle of the *Emich* case which spells out the duty of a trial judge in a civil case who must explain the scope and effect of the judgment in favor of the Government. The requirements of the *Emich* case were here honored only in their breach and the salutary provisions of Section 5 of the Clayton Act were as effectively denied to petitioner as though the statute had never existed. As has been seen above, what the Court granted in one breath it took away with the next so that the congressional mandate was effectively nullified.

4. The net effect of all the foregoing is to place a most serious limitation upon the freedom of competition in the motion picture industry. It preserves in the hands of companies with a notorious proclivity for conduct violative of the antitrust laws an unassailable power to keep

the field of first-run exhibition as their own private domain. So long as these defendants remain satisfied with the present method of limiting first-run exhibition to theatres located in the downtown sections of cities, there would seem to be no way of changing the fixed pattern of the industry. The forward looking economic spirit which fostered this country's growth, by reason of its readiness to adapt itself to changing conditions and times, has by this decision been stifled with consequences that will be as far reaching in every other field of endeavor as in the motion picture industry. The conclusion reached below is, therefore, completely antithetical to the spirit and letter of the anti-trust laws and the landmark decisions which have attempted to keep open the life stream of our economy. As was said by Chief Judge Kirkpatrick in *Milgrom* (94 F. Supp. at 421):

> "Progress under the competitive system comes from the constant development of new forms and methods and their entry into free competition with the old. Unless, or until, they have been demonstrated to be detrimental to the public, they should so far as possible be allowed to find their proper place in the industry, rather than have a place assigned to them by a dominant group with monopolistic power. The erection of a fence around an industry to keep out newcomers is wholly repugnant to the policy which underlies our anti-trust legislation.
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> "I am of the opinion that a restraint of commerce in the distribution of motion pictures which is imposed as a result of the adoption of a general policy, implemented by a system of clearances intended to operate uniformly throughout the entire field of exhibition and wholly to suppress a new form of competition is an unreasonable restraint and I hold that these defendants, in imposing such a restraint, are violating the anti-trust laws."

For all of the foregoing reasons, therefore, we urge that this Court issue its writ of certiorari in order to review the judgment below.

Respectfully submitted,

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